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No. 932

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

NATIONAL ASSOCIATION OF THEATRE OWNERS and JOINT COMMITTEE AGAINST TOLL TV, *Petitioners,*

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA
and
ZENITH RADIO CORPORATION and TECO, INC., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENTS ZENITH RADIO CORPORATION and TECO, INC. IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. A-1 to A-30) is not yet reported. The Federal Communications Commission's *Fourth Report and Order*

authorizing subscription television and prescribing the rules for its operation is reported at 15 F.C.C.2d 466 (1968).

QUESTIONS PRESENTED

1. Whether the Communications Act empowers the Federal Communications Commission to authorize subscription television (STV) upon determining that it would be in the public interest to permit a per-program fee to be charged to those subscribers electing to pay for any such program, but only under limitations designed to assure that STV service will supplement and not supplant the conventional (advertising-sponsored) service.

2. Whether the Commission's order authorizing STV illegally discriminates against the poor.

STATEMENT

The material facts are set forth in the petition and in the Brief in Opposition of the respondents Federal Communications Commission and the United States of America.

ARGUMENT

1. The primary reason advanced by petitioners for review of the decision below is that the question of the Federal Communications Commission's power to authorize subscription television as a supplement to conventional (advertising-financed) television has "national importance" (Pet. 11). However important the question appeared at the Court of Appeals level, it does not warrant review by this Court of the unanimous decision reached below. The well-reasoned opinion of the Court of Appeals reflects careful consideration and exposition of all relevant factors, is bottomed

on well-established principles of statutory construction and is fully in accord with decisions of this Court construing the Commission's broad statutory mandate.

In *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968), and *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367 (1969), the Court reaffirmed an unbroken line of authorities extending over a thirty-year period to the effect that, absent specific limitation or exception in the Communications Act, the Commission, under the general criterion of public interest, convenience and necessity, has wide discretion in choosing among competing demands for utilization of broadcast frequencies.[1] With these decisions before it, the court below readily approved the Commission's action in authorizing STV as a supplemental service. There is no reason for this Court to undertake plenary review of administrative action which is so clearly within the ambit of the Commission's powers as repeatedly and recently interpreted by this Court.

Petitioners contend (Pet. 11-14) that, because of the novelty of the new service,[2] the Commission is with-

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[1] See, e.g., Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940); National Broadcasting Co. v. United States, 319 U.S. 190 (1943); United States v. Storer Broadcasting Co., 351 U.S. 192 (1956).

[2] The Court of Appeals pointed out, however, that the authorization of a subscription service is not without precedent (Pet. App. A-12). See Functional Music Inc. v. Federal Communications Commission, 107 U.S. App. D.C. 34, 274 F. 2d 543 (1958), *cert. denied*, 361 U.S. 813 (1959); In the Matter of Muzak Corporation, 8 F.C.C. 581 (1941). Moreover, the decision in Connecticut Committee Against Pay TV v. Federal Communications Commission, 112 U.S. App. D.C. 248, 301 F. 2d 835, *cert. denied*, 371 U.S. 816 (1962), which approved Commission authorization of the trial

out power to license subscription television in the absence of a specific affirmative grant of such power in the Communications Act. This contention rests on a misreading of the Act which, as stated by the Court of Appeals, confers a "broad grant of general licensing authority" upon the Commission (Pet. App. A-10). Thus, Section 307(a)[3] authorizes the Commission, subject to limitations not pertinent here, to grant a station license to any applicant "if public convenience, interest or necessity will be served." Sections 303(a) and (b)[4] empower the Commission to classify stations and to prescribe the nature of the service rendered by each class of station and each station within any class. Congress, in Section 303(g), also directed the Commission, "[e]xcept as otherwise provided in this chapter" to "[s]tudy new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest."[5] Since there is no provision in the Communications Act either prohibiting a service

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of an STV service, necessarily found statutory support for the Commission's power to authorize a system requiring the payment of fees by the public. The petition for writ of certiorari filed by the theatre interests in that case—which petition was denied by this Court—presented specifically the questions (1) whether the Commission has the statutory authority to authorize a television system under which members of the public are required to pay a fee in order to view the programs presented, and (2) whether, before authorizing such a system, the Commission must first determine the applicability of its rate-regulation authority. The Solicitor General, in opposing certiorari, advised the Court that, in his view, the question of the Commission's power to authorize any kind of subscription service, whether on a trial or a regular basis, was necessarily raised by the petition for certiorari (Gov't Brief in Opposition to Certiorari, Oct. Term, 1962, No. 161, p. 12, n. 8).

[3] 47 U.S.C. § 307(a).

[4] 47 U.S.C. §§ 303(a), (b).

[5] 47 U.S.C. § 303(g).

requiring the direct payment of a fee by the public or limiting the use of radio frequencies to those services which were common when the law was enacted, these provisions, without more, afford ample basis for the Commission's action and a full answer to petitioners' attack upon it.

The Communications Act does not itemize the types of radio service which the Commission is authorized to license or the sources of economic support, and neither the statute nor the cases interpreting it provide a ground for petitioners' assertion that such specific authorization should be required in the case of STV. For, as this Court has declared, "Congress was acting in a field of regulation which was both new and dynamic." Its "dominant characteristic . . . was the rapid pace of its unfolding." *National Broadcasting Co.* v. *United States, supra,* 319 U.S. at 219. Congress "did not frustrate the purposes for which the Communications Act of 1934 was brought into being by attempting an itemized catalogue of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency." Instead, it defined broad areas for regulation under governing standards (*id.* at 219-20) and, recognizing that the Commission's "authority covers new and rapidly developing fields" (*United States* v. *Storer Broadcasting Co., supra,* 351 U.S. at 203), affirmatively directed the Commission to encourage new uses for radio (47 U.S.C. § 303(g)), and clothed it with wide discretion in choosing among the competing demands for frequencies. As the Court stated in *United States* v. *Southwestern Cable Co., supra,* 392 U.S. at 172:

> "Nothing in the language of § 152(a), in the surrounding language, or in the Act's history or pur-

> poses limits the Commission's authority to those activities and forms of communication that are specifically described by the Act's other provisions. The Section itself states merely that the 'provisions of [the Act] shall apply to all interstate and foreign communication by wire or radio . . . .' Similarly, the legislative history indicates that the Commission was given 'regulatory power over all forms of electrical communication.' . . . [I]t seems to us that it was precisely because Congress wished 'to maintain through appropriate administrative control, a grip on the dynamic aspects of radio transmission,' . . . that it conferred upon the Commission a 'unified jurisdiction' and 'broad authority'."

Thus, the court below was plainly correct in holding, upon the basis of this Court's decisions dealing with the Commission's power as well as pertinent legislative history, that: "the Act seems designed to foster diversity in the financial organization and *modus operandi* of broadcasting stations as well as in the content of programs, and we feel that the Commission did not exceed its authority in concluding that subscription television is entirely consistent with these goals" (Pet. App. A-17).

2. Petitioners insist (Pet. 15) that a determination as to whether the regulation of rates of broadcasters is permissible under the Communications Act is critical to the interpretation of the Commission's authority to authorize subscription television. The court below noted that the statute and the legislative history made it clear that insofar as broadcasting service is concerned, Congress believed in the desirability of effective competition to protect the public interest and left it to the Commission to foster such competition. Therefore, Congress did not make it obligatory for the

Commission to impose rate regulation for any type of broadcast service. The Commission took the reasonable position that it is unrealistic to anticipate excessive charges from a new service which, in order to survive, must obviously attract subscribers who have many alternatives. It expressly limited STV to communities served by at least four other Grade A signals from conventional or "free" television stations.[6] A subscription station thus has to compete vigorously to induce viewers of "free" television to pay money in order to view STV programs. It will also face the price competition of petitioners and other exhibitors of "box office" attractions such as first-run motion pictures, sports events and productions of the legitimate theatre. There will be ample time after the system is established for the Commission to determine whether its safeguards designed to foster competition are inadequate and whether the panopoly of rate regulation is required. If at that time it should be concluded that modification of the statute is necessary to augment the Commission's power in the rate regulation field, there will be ample opportunity to obtain such modification.

3. Petitioners assert (Pet. 18-22) that the program restrictions placed on subscription television amount to a denial of the STV broadcaster's right of free speech in violation of Section 326 of the Communications Act[7] and the First Amendment to the Constitution, and that the invalidity of those restrictions demonstrates the lack of authority in the Commission to authorize STV operations. These theatre interests are

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[6] FCC Rules and Regulations, 47 C.F.R. § 73.642(a).

[7] 47 U.S.C. § 326.

in the anomalous position of seeking to prevent STV service entirely by claiming a denial of the right of free speech of broadcasters who wish to furnish this service.[8] Their present contention is also surprising in view of the opposition maintained before the Commission by Petitioner Joint Committee Against Pay TV. It urged the Commission, in the event it authorized STV, to prescribe limits on the amount of time that could be devoted to motion picture features films on STV and to exclude from STV sporting events carried on conventional television within five years, as well as similar limitations "which we believe appropriate if any authorization is to be made at the present time."[9] The Joint Committee insisted that such restrictions are justified on the ground that they "are calculated to restrict Pay-TV from siphoning program material which historically has been made available on free television."[10]

The rules which the Commission has prescribed for subscription television provide in effect that STV will do what it was designed to do, namely, bring to the public a supplementary service in the nature of "box office" attractions for which the public now pays an admission charge in theatres, arenas, concert halls, etc., and not programs merely duplicative of those now carried to home screens by conventional

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[8] This anomaly is heightened by the fact that California legislation prohibiting STV, as initiated by theatre interests, was held unconstitutional as a denial of free speech. Weaver v. Jordan, 64 Cal. 2d 235, 49 Cal. Rptr. 537, *cert. denied*, 385 U.S. 844 (1966).

[9] Comments of Joint Committee Against Toll TV, October 10, 1966, p. 52, see *Fourth Report and Order*, pars. 282, 288-90, 302-03, 306.

[10] Comments, *supra* note 9, at 59.

television. Thus, the rules prohibit advertising during subscription broadcasts and attempt to confine the STV broadcaster during his subscription periods to programs which are not normally available to the advertising-financed broadcaster. Stations which are authorized to broadcast STV programs may, during non-subscription periods, broadcast the same type of programs and commercials as other stations. In adopting the subscription television rules, the Commission was thus performing one of its most important functions—the promotion of diversity in the broadcast programs available to the public. By adding subscription revenues as a new economic resource for broadcasting, while at the same time adopting measures to assure the co-existence of the two systems, the Commission added a new dimension to its efforts to diversify service.

Under Section 303(a) of the Act the Commission may classify radio stations and under Section 303(b) it may "[p]rescribe the nature of the service to be rendered by each class of licensed stations and each station within any class." The Commission's authority to consider the content of program service in allocating frequencies and adopting rules implementing its allocations, provided this is done reasonably and in accordance with the statutory mandate of public interest, convenience and necessity, has been repeatedly upheld against charges of censorship.[11] The decision below in

[11] See, e.g., Great Lakes Broadcasting Co. v. Federal Radio Commission, 59 App. D.C. 197, 37 F. 2d 993, 995, *cert. dismissed*, 281 U.S. 706 (1930); Simmons v. Federal Communications Commission, 83 U.S. App. D.C. 262, 169 F. 2d 670, *cert. denied*, 335 U.S. 846 (1948); Henry v. Federal Communications Commission, 112 U.S. App. D.C. 257, 302 F. 2d 191, *cert. denied*, 371 U.S. 821 (1962).

the instant case is fully in accord with *National Broadcasting Co.* v. *United States,* 319 U.S. 190 (1943), and *Red Lion Broadcasting Co.* v. *Federal Communications Commission,* 395 U.S. 367 (1969).

4. Finally, petitioners assert (Pet. 23-24) that the establishment of subscription television constitutes an arbitrary and unconstitutional discrimination against low income groups. They imply that the Court of Appeals failed to give this contention the effect it warranted because it was deterred by "the novelty of the question" (Pet. 23). It is apparent, however, from reading the opinion below, that the reason the court rejected the contention of discrimination was because, upon analysis, it was found to be "unsubstantial" (Pet. App. A-25-27). In view of the careful rules promulgated by the Commission (with only one of five stations serving a given community allowed to broadcast STV programs, and even that station required to carry a prescribed minimum of "free" programming) any diminution in the quantity of conventional programs will almost certainly be slight. Moreover, it will make available to a large part of the population who desire it the beneficial supplement of subscription programs as well as the advantages of monetary savings and convenience that group viewing of subscription broadcasts affords.

Although theatre owners profess to be concerned about the low-income groups and with saving "free" television, their real concern obviously is that STV will successfully compete with them by bringing certain programs to the public at a much lower per-family cost than the charges exacted for them at the theatres,

specifically, first-run feature films and sports events which can now be seen only on "closed circuit" television in the theatres. Subscription television has the capability to bring to lower-income groups by a relatively low-cost distribution system the only realistic opportunity they may ever have to see a Broadway play on opening night, to enjoy the brilliance of an opera, to sit "ringside" at a heavyweight championship fight, and to watch a movie without cuts to fit a time schedule, without commercial interruptions, and while it is still first-run. STV has the potential of expanding the recreational, cultural and educational opportunities of lower-income and other groups. This is the hope and expectation of the Commission, and the attempt to achieve it is a valid public purpose.

The *Fourth Report and Order,* which was issued 16 years after subscription television proceedings were begun before the Commission, represents a reasoned analysis of the advantages and possible risks of this new service in the light of public interest objectives in the more effective and more diverse use of our television resources. By making a free choice in the open market the American people will decide its future. The contrary arguments of the theatre interests are but an echo of the opposition interposed by vested interests throughout our history to prevent or delay the emergence of a new competitive industry. The Court below was clearly correct in holding that the Commission's action is well within its statutory purview and is supported by adequate public interest findings.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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